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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANNE L. THART, an individual and
trustee of THE ANNE L. THART
LIVING TRUST DATED JULY 1, 1998;
RUSSELL CHADWICK MCALLISTER,
an individual and trustee of THE
MCALLISTER FAMILY TRUST; AMY
MCALLISTER, an individual and trustee
of THE MCALLISTER FAMILY
TRUST; JOSEPH A. PROCOPIO, an
individual and trustee of THE JOSEPH A.
PROCOPIO SR. FAMILY TRUST;
GLENN T. PINDER, an individual and
sole member of PINDER
ENTERPRISES, LLP,

Plaintiffs,

vs.

COLLIERS INTERNATIONAL GROUP,
INC., a Canadian corporation;
MILLCREEK COMMERCIAL
PROPERTIES, LLC, a Utah limited
liability company; MILLROCK
INVESTMENT FUND 1, LLC, a Utah
limited liability company; KEVIN LONG,
an individual; BRENT SMITH, an

CASE NO.: 2:24-cv-10876-CV-E

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS BRENT SMITH AND
MILLROCK INVESTMENT FUND 1,
LLC'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Hearing

Date: July 18, 2025

Time: 1:30 p.m.

Courtroom: 5D

Judge: Hon. Cynthia Valenzuela

individual; DOUGLAS SCHEEL, an individual; TROY SCHEEL, an individual; MOUNTAIN WEST COMMERCIAL, LLC, a Utah limited liability company; MEGAN DESTITO, an individual; CAMS REALTY, LLC, a Utah limited liability company; KGL ADVISORS, LLC, a Utah limited liability company; SOUTHERN CALIFORNIA EXCHANGE SERVICES, LLC, a California limited liability company, and DOES 1-10, inclusive,

Defendants.

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1 Plaintiffs hereby submit their Opposition to Defendants Millrock Investment Fund
2 1, LLC and Brent Smith's (collectively "Millrock Defendants") Motion to Dismiss First
3 Amended Complaint.

4 **I. INTRODUCTION**

5 In this case, Plaintiffs Anne L. Thart, individually and as trustee of the Anne L.
6 Thart Living Trust dated July 1, 1998, Russell Chadwick McAllister and Amy
7 McAllister, individually and as trustees of the McAllister Family Trust, Joseph A.
8 Procopio, individually and as trustee of the Joseph A. Procopio Sr. Family Trust and
9 Glenn Pinder, individually and as sole member of Pinder Enterprises, LLP (collectively
10 "Plaintiffs") seek to redress numerous harms caused by Defendants, including resulting
11 from securities fraud, breach of fiduciary duty, negligence and negligent
12 misrepresentation. In this case, each of the named Defendants collectively worked on a
13 scheme to deprive Plaintiffs of their hard earned retirement funds by syndicating and
14 offering securities interests in real property to retail investors by way of misleading
15 offering documents, practices violating industry norms and without proper licensing to
16 avoid the oversight by securities regulatory authorities.

17 In their Motion to Dismiss, the Millrock Defendants claim that Plaintiffs failed to
18 comply with all applicable pleading standards - notice pleading, heightened pleading and
19 the Private Securities Regulatory Reform Act – by ignoring and intentionally re-
20 interpreting Plaintiffs' First Amended Complaint and the allegations therein. The Motion
21 is a blatant attempt to avoid responsibility and liability for inflicting millions of dollars in
22 damage to Plaintiffs.

23 While certain claims, including fraud, require specificity and/or heightened
24 pleading, the Millrock Defendants encourage this Court to adopt pleading requirements
25 that are impossible to meet and inconsistent with the law. In doing so, they seek to
26 prevent Plaintiffs from pleading any of their claims without regards to the factual
27 allegations asserted.

28 As set forth in the First Amended Complaint, the Millrock Defendants are

undoubtedly at the center of the wrongful acts alleged – they purchased the Crocket property, syndicated it for sale to investors, hired agents without the proper licensing to sell tenant in common interests to investors, created and approved Offering Memorandum without proper and fulsome disclosures, controlled a marketing entity to create the illusion of profitability and failed to provide key information to Plaintiffs before they purchased their tenant in common interests. In doing so, the Millrock Defendants initiated a scheme where they received massive profits and continually used investor proceeds to repay new investors under the guise that profitable tenants had paid rent, taxes, costs and insurance to convince Plaintiffs and other investors that they could collect passive income without risk of loss. They did so for the sole purpose of continuing their scheme and collecting millions of dollars of profits at the expense of elderly, retired investors.

A holistic review of the First Amended Complaint, and the allegations therein, requires that this Court deny the Motion to Dismiss in its entirety.

II. FACTUAL BACKGROUND

Defendants collectively engaged in a conspiracy to defraud Plaintiffs of their hard earned retirement funds. (Dkt. 91, ¶90).

The Millrock Defendants participated in the scheme to defraud and deceive Plaintiffs by making misrepresentations and omissions, selling tenant in common investments in the Crocket Property to Plaintiffs and reaping the benefits of the fraud by collecting millions of dollars in profits.

In an effort to further their scheme to sell securities to elderly investors, Millrock entered into agreements with Defendants Millcreek Commercial Properties, LLC and Colliers International to act as their agents. In particular, as outlined in the Memorandum of Understanding (attached to the First Amended Complaint), Millrock agreed:

- “We (the Smith family and the Long family) have created an LLC (Investment Fund) to invest in quality long term debt free STNL properties (Millrock Investment Fund 1, LLC).”
- “The fund acquires or develops these assets with the intent to market them

1 for resale by syndicating them as real estate investments to middle class
2 investors for their IRAs and 401Ks, as well as offering them to traditional
3 small 1031 exchange clients and as boot coverage for large 1031 clients.”

- 4 • “These high-quality assets will be sold as Tenant In Common real estate
5 with no debt.”
- 6 • “The fund retains The Kevin Long Team (via Colliers) as their exclusive
7 agent for all acquisitions. The Fund documents guarantee the Kevin Long
8 Team a minimum 2% commission on each acquisition.”
- 9 • “The Fund lists the TIC resale product with The Kevin Long Team (via
10 Colliers.”
- 11 • “The Fund has a marketing company (Millcreek Commercial Properties) to
12 brand the TIC properties and pays the unique marketing costs associated
13 with this disruptive approach of marketing directly to middle class clients as
14 TICs.”
- 15 • “Kevin Long in cooperation with J. Adam Long own the LLC that is the
16 managing partner of the Fund - MillRock Investment Fund Management.”
- 17 • “The Fund is also Kevin’s client in his capacity as an agent here at
18 Colliers.”
- 19 • “The listing agreement has the Fund pay Colliers in favor of The Kevin
20 Long Team a 4% commission on all sales. The Listing Agent can offer 3%
21 to cooperating brokers and retain only 1% on certain transactions as they
22 see fit. ...”
- 23 • “The Fund has a separate agreement with Millcreek Commercial Properties
24 (MCP) where MCP is compensated for marketing and client services based
25 on the sales volume of the fund. ...”
- 26 • “In cooperation with Colliers, MCP and the Kevin Long team agrees to
27 create, implement and manage a quality agent training and mentoring
28 program. It is our goal to create a sales team and ongoing training program

1 that supports Collier's role as the market leader in the Intermountain West."
2 (Dkt. 91-1)

3 In an effort to sell the TIC investments to retail investors, Millrock, its principals
4 and agents made numerous false and misleading statements in the Offering Memorandum
5 including:

- 6 • "Pulse Healthcare System is made up of nine clinic locations across the state
7 of Texas. The twelve healthcare providers at Pulse put one-on-one
8 relationship with their patients at the core of what they do. ... Pulse prioritizes
9 state-of-the-art resources. The clinics are equipped with the best technology
10 and treatment options to ensure that patients are feeling better without delay."
- 11 • "Pulse Healthcare includes a well-performing vascular surgery portfolio."
- 12 • "4 additional locations Ideally situated to meet the demand for vascular
13 surgery."
- 14 • "15-Year Sale Leaseback on Triple Net (NNN) Leases."
- 15 • "Full Corporate Guarantee from Pulse Healthcare."
- 16 • "Pandemic, Recession and Internet Resistant Tenant with 8 clinics throughout
17 the Greater Houston area."
- 18 • "Landlord Responsibilities None"
- 19 • "Insurance / Taxes/CAM/Utilities Responsibility of Tenant"

20 (*Id.*, ¶ 78).

21 The Millrock Defendants also omitted material information that would be
22 important to any investor including:

- 23 • The tenant was not an established business with positive operating history,
24 but a startup that was funded by Millrock to purchase equipment and
25 machinery necessary to operate the surgery center (*id.*, ¶76);
- 26 • The Property was not professionally managed but had hired a lease
27 administrator (*id.*, ¶75);
- 28 • The tenant did not operate a surgery center from the Crocket Property (*id.*, ¶

85);

- The tenant was insolvent, unprofitable and financially unsustainable (*id.*, ¶¶ 84d, 86);
- The price of the property was not commensurate with the value (*id.*, ¶¶ 84(d), 90);
- They did not conduct any due diligence on the property (*id.*, ¶84c).

The Millrock Defendants’ agents, Long, Smith, Millcreek and Colliers, also made additional material misrepresentations and omissions for which Millrock is responsible as a matter of law. *See* Cal. Civ. Code § 2338.

III. LEGAL ARGUMENT

A. **Standard on Motion to Dismiss**

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint must only contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678. The Court must “accept all factual allegations in the complaint as true.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (emphasis added). The Court will also “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Id.* “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

Notably, “Pleadings need suffice only to put the opposing party on notice of the claim. All pleadings shall be construed as to do substantial justice, and [n]o technical forms of pleading ... are required. Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.” *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) (internal citations and quotations

1 omitted). General pleading requirements are governed by Fed. R. Civ. Proc. 8(a). “Rule
2 8(a) does not require plaintiffs to plead the legal theory, facts or elements underlying
3 their claim.” *In re Initial Pub. Offering Sec. Litig.*, 241 F.Supp.2d 281, 323 (S.D.N.Y.
4 2003). Moreover, “[a] complaint that complies with the federal rules of civil procedure
5 cannot be dismissed on the ground that it is conclusory or fails to allege facts.” *Id.*

6 While Fed. R. Civ. Proc. 9(b) requires heightened pleading of fraud claims, it does
7 not require plaintiff to “provide every factual detail supporting its fraud claim.” *S.E.C. v.*
8 *Ficeto*, 839 F.Supp.2d 1101, 1105 (C.D. Cal. 2011), abrogated by *Stoyas v. Toshiba*
9 *Corp., on other grounds*, 896 F.3d 933 (9th Cir. 2018). It is sufficient to allege each
10 defendant’s role, the specific fraudulent acts, and how the acts constitute fraud. *See id.*
11 Rule 9(b) permits “intent, knowledge, and other condition of mind of a person [to] be
12 averred generally.” *Hullinger v. Anand*, No. CV1507185SJOPJWX, 2016 WL 11750270,
13 at *7 (C.D. Cal. July 8, 2016), on reconsideration, No. CV1507185SJOFFMX, 2016 WL
14 4409196 (C.D. Cal. Aug. 11, 2016). “[T]o comply with Rule 9(b), allegations of fraud [or
15 substantial assistance] must be ‘specific enough to give defendants notice of the
16 particular misconduct which is alleged to constitute the fraud charged so that they can
17 defend against the charge and not just deny that they have done anything wrong.’ ” *Bly-*
18 *Magee v. State of Cal.*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Neubronner v.*
19 *Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). “[I]n applying rule 9(b) [courts] must not lose
20 sight of the fact that it must be reconciled with rule 8 which requires a short and concise
21 statement of claims.” *In re Initial Pub. Offering Sec. Litig.*, 241 F.Supp.2d at 326.
22 “Fraud may be pleaded without long or highly detailed particularity.” *Id.*

23 In the context of the PSLRA, examination of the complaint involves the “dual
24 inquiry” of, “whether any of the plaintiff’s allegations, standing alone, are sufficient to
25 create a strong inference of scienter,” and a “‘holistic’ review of the same allegations to
26 determine whether the insufficient allegations combine to create a strong inference of
27 intentional conduct or deliberate recklessness.” *Zucco Partners, LLC v. Digimarc, Corp.*,
28 552 F.3d 981, 992 (9th Cir. 2009). The Ninth Circuit has further clarified the two-step

1 analysis is appropriate as long as it “does not unduly focus on the weakness of individual
2 allegations to the exclusion of the whole picture”; alternatively, it may conduct only a
3 holistic review, mindful that it does not “simply ignore the individual allegations and the
4 inferences drawn from them.” *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694,
5 703 (9th Cir. 2012).

6 **B. The Obligations of Sellers of Securities**

7 As a threshold matter, Plaintiffs allege that the Millrock Defendants sold securities
8 to the McAllisters and received commissions in connection with each transaction. (*Id.*, ¶
9 20, 30-31, 53). Therefore, for the purposes of the pleading stage, the Court must accept
10 as true that the Millrock Defendants were sellers of securities and bound by the law and
11 obligations applying to sellers of securities. *Tellabs, Inc., supra*, 551 U.S. at 322.

12 The securities laws provide stringent responsibilities for truthful disclosure of
13 material facts by salespeople. *Hanley v. Securities and Exchange Commission* outline
14 these duties succinctly. In *Hanley*, the Second Circuit explained: “[S]alesmen are ‘under
15 a duty to investigate, and their violation of that duty brings them within the term ‘willful’
16 in the Exchange Act.’ Thus, a salesman cannot deliberately ignore that which he has a
17 duty to know and recklessly state facts about matters of which he is ignorant. He must
18 analyze sales literature and must not blindly accept recommendations made therein. The
19 fact that his customers may be sophisticated and knowledgeable does not warrant a less
20 stringent standard.” *Hanley v. Sec. & Exch. Comm’n*, 415 F.2d 589, 595–96 (2d Cir.
21 1969) (emphasis added). In its opinion, the Court concluded, “In summary, the standards
22 by which the actions of each petitioner must be judged are strict. Where the salesman
23 lacks essential information about a security, he should disclose this as well as the risks
24 which arise from his lack of information.” *Id.* (emphasis added); *see also SEC v. North*
25 *American Research and Development Corp.*, 424 F.2d 63,84 (2d Cir. 1970); *Canizaro v.*
26 *Kohlmeyer & Co.*, 370 F.Supp. 282, 289 (E.D. La. 1974, *aff’d*, 512 F.2d 484 (5th Cir.
27 1975) (“a broker who recommends a security or who volunteers an “investment opinion”
28 or makes a prediction in order to effect a sale or purchase must have a reasonable basis

1 for what he tells his customer.”)

2 The Millrock Defendants encouraged Plaintiffs to rely on them preparing and
3 approving an Offering Memorandum riddled with misrepresentations, half truths and
4 omissions, by holding themselves out as experts and claiming that the tenant in common
5 investment had no risk and could be sold at any time. (Dkt. 91, ¶¶ 17-19, 78-79). If
6 Plaintiffs had known about the misrepresentations, half truths and omissions in the
7 Offering Memorandum or that the Millrock Defendants had not done any investigation
8 and they had the potential to lose their investment entirely, it would have undermined the
9 Millrock Defendants’ representations that Plaintiffs relied upon in purchasing the
10 investments.

11 **C. Plaintiffs’ Claim for 10b5 Satisfies PSLRA and FRCP 9(b)**

12 Plaintiffs allege claims for securities fraud under SEC Rules 10b-5(a), (b) and (c).
13 “To implement § 10(b), the SEC promulgated Rule 10b–5, 17 CFR § 240.10b–5. Rule
14 10b–5 is composed of three parts that describe the type of conduct prohibited by § 10(b).
15 The second part proscribes the making of “any untrue statement of a material fact” or the
16 omission of any material fact that is necessary in order to make the statements made not
17 misleading. Rule 10b–5(b), 17 CFR § 240.10b–5(b). The first and third parts make it
18 unlawful for any person “to employ any device, scheme, or artifice to defraud” or “to
19 engage in any act, practice, or course of business which operates or would operate as a
20 fraud or deceit upon any person.” *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040,
21 1046 (9th Cir. 2006), cert. granted, judgment vacated sub nom. *Avis Budget Grp., Inc. v.*
22 *California State Teachers’ Ret. Sys.*, 552 U.S. 1162 (2008), and vacated sub nom.
23 *Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008).

24 **1. Claims Under 10b-5**

25 To show securities fraud under Section 10(b) and Rule 10b–5 of the Securities
26 Exchange Act, plaintiffs must allege facts sufficient to establish (1) a material
27 misrepresentation or omission; (2) made with scienter, i.e., a wrongful state of mind; (3) a
28 connection between the misrepresentation and the purchase or sale of a security; (4)

1 reliance upon the misrepresentation; (5) economic loss; and (6) loss causation. *Loos v.*
2 *Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014), amended (Sept. 11, 2014).

3 With regards to alleged omissions, particularity standards are relaxed and only
4 require content of omission, where it could have been or should have been revealed and
5 representative examples. *See William Morris Endeavor Ent., LLC v. Writers Guild of*
6 *Am.*, 478 F.Supp.3d 932, 943–44 (C.D. Cal. 2020). Plaintiffs do not have an obligation to
7 identify representative examples of false statements to support every allegation. *United*
8 *States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (“a complaint
9 need not allege “a precise time frame,” “describe in detail a single specific transaction” or
10 identify the “precise method” used to carry out the fraud. The complaint also need not
11 “identify representative examples of false claims to support every allegation.”) (internal
12 citations omitted).

13 “[F]alsity and scienter in private securities fraud cases are generally strongly
14 inferred from the same set of facts, and the two requirements may be combined into a
15 unitary inquiry under the PSLRA.” *In re Daou Sys., Inc.*, 411 F.3d 1006, 1015 (9th Cir.
16 2005) (quotation marks omitted); *Hsu v. Puma Biotechnology, Inc.*, 213 F.Supp.3d 1275,
17 1286 (C.D. Cal. 2016). “[F]ailure to discover relevant information about the securities
18 [salespeople] were selling, amounted to recklessness sufficient to establish the requisite
19 scienter.” *Everest Sec., Inc. v. S.E.C.*, 116 F.3d 1235, 1239 (8th Cir. 1997). To adequately
20 plead scienter under the PSLRA, the complaint must “state with particularity facts giving
21 rise to a strong inference that the defendant acted with the required state of mind.” 15
22 U.S.C. § 78u–4(b)(2)(a). Scienter requires a state of mind as one that intends to deceive,
23 manipulate, or defraud or made with intentional or deliberate recklessness. *See Metzler*
24 *Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008);
25 *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1180 (9th Cir. 2009), *aff’d sub*
26 *nom. Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011) (quotations and citations
27 omitted). “The inferences that the defendant acted with scienter need not be ... of the
28 ‘smoking-gun’ genre.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324

1 (2007).

2 Although Defendants' Motion claims that the First Amended Complaint constitutes
3 a "group" or "shotgun" pleading, a review of First Amended Complaint demonstrates
4 otherwise. *See May v. Google LLC*, No. 24-CV-01314-BLF, 2024 WL 4681604, at *7
5 (N.D. Cal. Nov. 4, 2024) ("But so-called "group pleading" is not fatal if the complaint
6 gives defendants fair notice of the claims against them."); *In re New Century*, 588
7 F.Supp.2d 1206, 1224 (C.D. Cal. 2008) (holding that as long as the Complaint alleges
8 violations of statements for defendants that do not rest on group pleading, there is
9 sufficient specificity to support false statements and omissions under PSLRA); *Iowa Pub.*
10 *Employees' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F.Supp.3d 285,
11 317 (S.D.N.Y. 2018) ("Group pleading 'is insufficient to withstand review on a motion to
12 dismiss ... [where there are] no factual allegations in the complaint to connect each, or
13 any, of the group defendants, directly to the conspiracy[.]' Because the Amended
14 Complaint alleges each Defendant's participation separately, it is not impermissible group
15 pleading to refer to their collective actions in furtherance of the conspiracy using a more
16 general phrase such as 'the Prime Broker Defendants.'"); *see also In re Marsh &*
17 *McLennan Companies, Inc. Sec. Litig.*, 501 F.Supp.2d 452, 479 (S.D.N.Y. 2006)
18 ("Defendants' argument that group pleading is no longer permissible under the PSLRA is
19 rejected.").

20 The First Amended Complaint specifically alleges that the Millrock Defendants
21 made the following misrepresentations in the Offering Memorandum:

- 22 • "Pulse Healthcare System is made up of nine clinic locations across the state
23 of Texas. The twelve healthcare providers at Pulse put one-on-one
24 relationship with their patients at the core of what they do. ... Pulse
25 prioritizes state-of-the-art resources. The clinics are equipped with the best
26 technology and treatment options to ensure that patients are feeling better
27 without delay."
- 28 • Pulse Healthcare includes a well-performing vascular surgery portfolio."

- 1 • “4 additional locations Ideally situated to meet the demand for vascular
- 2 surgery.”
- 3 • “15-Year Sale Leaseback on Triple Net (NNN) Leases.”
- 4 • Full Corporate Guarantee from Pulse Healthcare.”
- 5 • “Pandemic, Recession and Internet Resistant Tenant with 8 clinics
- 6 throughout the Greater Houston area.”
- 7 • “Landlord Responsibilities None”
- 8 • “Insurance / Taxes/CAM/Utilities Responsibility of Tenant”

9 (Dkt. 91, ¶¶ 78-79).

10 They also made the following omissions of material fact, which were necessary to
11 be disclosed to make the Offering Memorandum not misleading:

- 12 • “An investment in the Millcreek TIC Properties, including the Property, was not a
- 13 safe, stable and reliable investment that would generate dependable income, but
- 14 was risky and unsuitable for any Plaintiff, particularly in light of the tenants’
- 15 financial condition.”
- 16 • “The tenants of the properties were insolvent, unprofitable, financially
- 17 unsustainable.”
- 18 • “Defendants did not conduct any actual due diligence on proposed tenants and did
- 19 not have any reliable financial information showing that tenants were successful or
- 20 solvent.”
- 21 • “Plaintiffs were not purchasing real estate with value commensurate with their
- 22 investment. The actual cost of the buildings was substantially less than the price
- 23 that Plaintiffs were required to pay for their TIC interests, and the fair market value
- 24 of the buildings as real estate would be only a fraction of the amount of the
- 25 Plaintiffs’ collective TIC Investment.”
- 26 • “The professionals that introduced Millcreek to Plaintiffs each received substantial
- 27 commissions.” (*Id.*, ¶ 84).

28 The Millrock Defendants also failed to disclose that had provided the tenant \$2,000,000

1 in startup costs for necessary expenses to run the surgery center. (*Id.*, ¶ 98). Each of these
2 misrepresentations were made in the sales process before Plaintiffs purchased their TIC
3 interests.

4 The First Amended Complaint also alleges that the Millrock Defendants, along
5 with the other defendants, omitted and failed to disclose the following material facts as a
6 part of the fraudulent scheme and deceptive practices that defendants collectively
7 employed:

- 8 • The tenant was not an established business with positive operating history,
9 but a startup that was funded by Millrock to purchase equipment and
10 machinery necessary to operate the surgery center (*id.*, ¶76);
- 11 • The Property was not professionally managed but had hired a lease
12 administrator (*id.*, ¶75);
- 13 • The tenant did not operate a surgery center from the Crocket Property (*id.*, ¶
14 85);
- 15 • The tenant was insolvent, unprofitable and financially unsustainable (*id.*, ¶¶
16 84d, 86);
- 17 • The price of the property was not commensurate with the value (*id.*, ¶¶
18 84(d), 90);
- 19 • They did not conduct any due diligence on the property (*id.*, ¶84c).

20 To be sure, the law is clear that the failure to conduct due diligence into the
21 security before selling and/or recommending it to investors is sufficient to allege
22 recklessness as a matter of law. *See Everest Sec., Inc. v. S.E.C.*, *supra*, 116 F.3d at 1239;
23 *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000) (strong inference of recklessness
24 “may arise where the complaint sufficiently alleges that the defendants: (1) benefitted in
25 a concrete and personal way from the purported fraud [] (2) engaged in deliberately
26 illegal behavior []; (3) knew facts or had access to information suggesting that their
27 public statements were not accurate[]; or (4) failed to check information they had a duty
28 to monitor, [].”); *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1145 (9th Cir. 2017)

1 (Particular allegations that a defendant was aware of or “had actual access to the disputed
2 information raise a strong inference of scienter.”)

3 **2. Claims for Deceptive Practices under Rule 10b-5(a), (c)**

4 “Subsection (a) of [10b5] makes it unlawful to employ any device, scheme, or
5 artifice to defraud and subsection (c) makes it unlawful to engage in any act, practice, or
6 course of business that operates...as a fraud or deceit. Under subsection (a), [a] device is
7 simply that which is devised, or formed by design; a scheme is a project, plan, or
8 program of something to be done; and an artifice is an artful stratagem or trick. [A] non-
9 speaking actor who engages in a scheme to defraud has used or employed a deceptive
10 device within the meaning of § 10(b). The words act and practice in subsection (c) are
11 similarly expansive. An act is a doing or thing done, and a practice is an action or deed.
12 Together, [t]hese provisions capture a wide range of conduct. While the second paragraph
13 of Rule 10b-5 specifies the making of an untrue statement...[t]he first and third
14 subparagraphs are not so restricted.” *Abdo v. Fitzsimmons*, No. 17-CV-00851-TSH, 2021
15 WL 616324, at *10 (N.D. Cal. Feb. 17, 2021) (internal citations and quotations omitted).

16 Elements of scheme liability pursuant to 10b5(a), (c) include: “(1) use or
17 employment of any manipulative or deceptive device or contrivance; (2) scienter; (3) a
18 connection with the purchase or sale of a security; (4) reliance upon the deceptive or
19 manipulative act by investors; (5) economic loss; and (6) loss causation.” *United Ass’n*
20 *Nat’l Pension Fund v. Carvana Co.*, No. CV-22-02126-PHX-MTL, 2024 WL 5153343, at
21 *19 (D. Ariz. Dec. 16, 2024), reconsideration denied, No. CV-22-02126-PHX-MTL,
22 2025 WL 371717 (D. Ariz. Feb. 3, 2025). “[G]iven that the exact mechanism of the
23 scheme is likely to be unknown to the plaintiffs, allegations of the nature, purpose, and
24 effect of the fraudulent conduct and the roles of the defendants are sufficient for alleging
25 participation.” *Id.* (internal citations and quotations omitted). Notably, **the PSLRA does**
26 **not apply to 10b5(a), (c) claims.** See *Oaktree Principal Fund V, LP v. Warburg Pincus*
27 *LLC*, No. CV-15-8574-PSG, 2016 WL 6782768, at *14 (C.D. Cal. Aug. 9, 2016).

28 The Millrock Defendants participated in the deceptive scheme by purchasing and

1 syndicating the Crocket Property to retail investors, preparing and approving the Offering
2 Memorandum, hiring agents Millcreek and Colliers to sell interests in the Crocket
3 Properties, which were securities, without proper licensure, recommending the TIC
4 investments to Plaintiffs, assuring them that the investment had no risk and stating that
5 the investment could be sold at any time without any reasonable basis for believing these
6 statements to be true as they had conducted no due diligence or investigation into the
7 investment. Notably, the purpose of licensing requirements for the sale of securities is to
8 protect investors like Plaintiffs. As Courts routinely acknowledge, transaction-based
9 compensation suggests that a party must register as a broker because it “can encourage
10 high pressure sales tactics [in conflict] with the interests of his or her client.” *Sec. &*
11 *Exch. Comm'n v. Earle*, 751 F.Supp.3d 1044, 1055–56 (S.D. Cal. 2024) (citing *SEC v.*
12 *Murphy*, 50 F.4th 832, 846 (9th Cir. 2022) (internal quotation marks omitted); *EdgePoint*
13 *Capital Holdings, LLC v. Apothecare Pharmacy, LLC*, 6 F.4th 50, 57 n.5 (1st Cir. 2021)
14 (“Transaction-based compensation is a hallmark indication that a party has acted as a
15 broker and must register because it represents a potential incentive for abusive sales
16 practices that registration is intended to regulate and prevent.” (internal quotation marks
17 removed)). However, in this case, the Millrock Defendants intentionally subverted the
18 licensing regime and oversight of regulatory authorities meant to protect investors like
19 Plaintiffs.

20 **3. Misrepresentations and Omissions in the Offering Memoranda**

21 “For purposes of Rule 10b–5, the maker of a statement is the person or entity with
22 ultimate authority over the statement, including its content and whether and how to
23 communicate it.” *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142
24 (2011). “[D]issemination of false or misleading statements with intent to defraud can fall
25 within the scope of subsections (a) and (c) of Rule 10b–5, as well as the relevant statutory
26 provisions. ...even if the disseminator did not “make” the statements.” *Lorenzo v. Sec. &*
27 *Exchnge. Commission*, 587 U.S. 71, 78 (2019). “Those who disseminate false statements
28 with intent to defraud are primarily liable under Rules 10b–5(a) and (c), § 10(b), and §

1 17(a)(1), even if they are secondarily liable under Rule 10b–5(b).” *Id.*, at 83.

2 The group pleading doctrine allows the court to presume that statements in certain
3 group-published documents (i.e. registration statements, annual reports, prospectuses) are
4 the collective work of certain individuals. *See In re AOL Time Warner, Inc. Sec. and*
5 *ERISA Lit.*, 381 F.Supp.2d 192, 220 (S.D.N.Y. May 5, 2004). A plaintiff may invoke the
6 group pleading doctrine against a defendant if the plaintiff has alleged facts indicating
7 that “the defendant was a corporate insider or affiliate with direct involvement in the
8 daily affairs of the company.” *In re BISYS Sec. Litig.*, 397 F.Supp.2d 430, 440 (S.D.N.Y.
9 Oct. 28, 2005) (citation omitted).

10 Millrock as the owner and syndicator of the tenant in common investments sold to
11 Plaintiffs is the maker of statements in the Offering Memoranda and responsible for its
12 contents. By distributing the Offering Memoranda to Plaintiffs and enabling Millcreek to
13 act as its agents to sell the investments through its website, Millrock is also responsible
14 for the misrepresentations, omissions and deceptive statements on the Millcreek website.
15 *See* Cal. Civ. Code § 2338; *Maron v. Swig*, 115 Cal.App. 2d 87, 91 (1952) (“under Civil
16 Code section 2338 a principal is responsible to third parties for wrongful acts committed
17 by his agent in and as a part of the transaction of the business of the agency and for the
18 agent's willful omission to fulfill the obligations of the principal.”). Likewise, Brent
19 Smith, as an owner of both Millcreek and Millrock who was involved in the day-to-day
20 affairs of both companies that approved, reviewed and revised the Offering Memoranda
21 and website, is also responsible for the deceptive conduct and statements therein. *See In*
22 *re AOL Time Warner, Inc. Sec. and ERISA Lit.*, 381 F.Supp.2d at 220.

23 **4. Scienter**

24 The Millrock Defendants also claim that Plaintiffs failed to plead scienter.
25 However, this contention is based only upon an intentionally misreading of the First
26 Amended Complaint and ignorance of the applicable law. Scienter under PSLRA may be
27 established by pleading “motive and opportunity to commit fraud” coupled with “strong
28 circumstantial evidence of conscious misbehavior or recklessness.” *See In re Initial Pub.*

1 *Offering Sec. Litig.*, 241 F.Supp.2d at 330; see also *In re Terayon Commc'ns Sys., Inc.*,
2 No. C 00-01967 MHP, 2002 WL 989480, at *10 (N.D. Cal. Mar. 29, 2002)
3 (“facts showing motive and opportunity to commit fraud can provide confirming
4 reasonable inferences that help establish a strong inference along with other allegations.”)

5 Moreover, California law imputes the knowledge of Millrock’s agents, including
6 Long, Smith, Millcreek¹ and Colliers, to Millrock. See Cal. Civ. Code § 2332 (“As
7 against a principal, both principal and agent are deemed to have notice of whatever either
8 has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to
9 communicate to the other.”)

10 The First Amended Complaint specifically alleges the relationship between Smith
11 and Millrock (Dkt. 91, ¶16) - Smith was an owner of Millrock and Millcreek and his
12 family was Millrock’s largest investor. It also alleges that the Millrock Defendants each
13 had

14 “a motive to deceive Plaintiffs because they were paying investor
15 distributions on all their properties from investor proceeds. Accordingly,
16 they needed new investor funds (from Plaintiffs and others) to continue
17 paying distributions and keeping investors from their tenant in common
18 properties from learning that the investments were worth much less than
19 they were sold for and close to insolvent. The only way to keep the scheme
20 going was to use new investor funds to pay distributions to older investors or
21 else the entire house of cards would collapse and all investors would learn of
22 their malfeasance.” (Dkt. 91, ¶93).

23 After investors discovered Defendants’ fraud, there was a cascade effect resulting in
24 tenants of twelve properties defaulting on the leases and numerous bankruptcies. (*Id.*, ¶
25 102). There are also numerous allegations that the Millrock Defendants knew that
26 statements they made to Plaintiffs were false and/or misleading at the time they made
27 them. For example, paragraph 41 alleges that Smith and Millrock (among others)
28

26 ¹ On December 26, 2024, Long admitted that “Millcreek was the marketing arm of an
27 investment fund and when the fund decided to stop developing and marketing real estate
28 properties due to various market evolutions, the viability of Millcreek’s business was
decimated.” (Dkt. 91, ¶26).

1 masterminded marketing of the Property to investors, including Plaintiff and that
2 Millrock agents sent emails stating that the property was “perfect” for “investors looking
3 for a safe, secure and stable investment.” In the same emails, Millrock’s agents claimed:

- 4 • “Medical office buildings usually have lower vacancy rates than other types
5 of commercial properties.
- 6 • Medical properties generally produce a steady case flow for investors.
- 7 • Healthcare is a ‘recession resilient’ product.” (Dkt. 91, ¶41).

8 Millrock’s agents also emailed Plaintiffs stating that its properties “guarantee a
9 consistent stream of passive income” and are “fully managed.” (*Id.*, ¶42). The Millrock
10 Defendants also claimed in the Offering Memorandum that the investment was
11 “Pandemic, Recession and Internet Resistant Tenant...” and that “Landlord
12 Responsibilities None” echoing the statements in the emails to investors. (*Id.*, ¶78).
13 These statements were reviewed and approved by Smith before they were finalized. (*Id.*,
14 ¶ 79). At that time that these representations were made, the Millrock Defendants knew
15 that the investment was not “safe, secure and stable” or “pandemic, recession and internet
16 resistant” because other tenants in other medical properties had already defaulted on their
17 leases resulting in “lost income when tenants refused to pay monthly leases, discovered
18 that the value of their investments were very low, the properties could not be released at
19 the same rates as the previous tenants, the properties could not be sold at the price per
20 square foot sold to investors, investors were required to pay taxes, maintenance fees and
21 insurance out of their own pockets and were required to be involved in day to day
22 management of the properties.” (*Id.*, ¶74). Further, Millrock had provided the tenant,
23 Pulse Physician Organization, \$2,000,000 for startup costs and equipment to run the
24 surgery center when it purchased the Property, but failed to disclose this essential fact to
25 Plaintiffs before they invested. (*Id.*, ¶¶76, 97, 98).

26 Likewise, the Millrock Defendants knew that the Property was not fully managed
27 with no landlord responsibilities as represented to Plaintiffs because CAMS Realty and
28 Mary Street considered themselves the “lease administer” not property manager. This

1 was first communicated to Plaintiffs on November 15, 2023 when Long claimed “Mary’s
2 role is to administer the lease – not manage the Property.” (*Id.*, ¶96).

3 **D. Claims 3 Through 12 Are Well Pled**

4 The Millrock Defendants make the blanket claim that all the claims are based in
5 fraud and must comply with heightened pleading standards under Rule 9(b). The
6 Millrock Defendants are wrong. Indeed, the very case they cite to support their
7 argument, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003) held that “where
8 fraud is not an essential element of a claim, only allegations (“averments”) of fraudulent
9 conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of
10 non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule
11 8(a).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003); *see also*
12 *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1071-1072 (9th Cir. 2009) (acknowledging notice
13 pleading standard for breach of fiduciary duty and professional negligence claims);
14 *Petersen v. Allstate Indem. Co.*, 281 F.R.D. 413, 416-418 (C.D. Cal. 2012) (“Rule 9(b)
15 does not apply to negligent misrepresentation claims . . . applying heightened pleading
16 standard to negligence is contrary to the express language and policy of Rule(9) . . .”);
17 *Smallwood v. NCsoft Corp.*, 730 F.Supp.2d 1213, 1231 (D. Haw. 2010) (“A negligent
18 misrepresentation claim does not require intent, and accordingly is not subject to Rule
19 9(b).”).

20 **1. Claims 3 and 4 for Financial Elder Abuse Are Well Plead**

21 The Millrock Defendants contend that the Rule 9(b) applies to claims of financial
22 elder abuse. A review of the Financial Elder Abuse statute demonstrates that fraud is not
23 an essential element of financial elder abuse. Cal. Wel. & Inst. Code §15160.30(b).

24 Moreover, the First Amended Complaint contends that the Millrock Defendants
25 engaged in financial elder abuse as follows: “Defendants put their own interest ahead of
26 Plaintiffs’ financial well-being; Defendants engaged in undisclosed conflicts of interest
27 and did not minimize these conflicts; Defendants pursued an unduly high-risk and high-
28 cost investment strategy; Defendants did not recommend less risky, less costly alternative

1 strategies even though that was the strategy Plaintiffs wanted and believed they were
2 receiving from Defendants. Plaintiffs relied on Defendants' representations about the
3 products and services. Defendants omitted key facts regarding the products and services
4 and misstated, misrepresented, concealed and/or omitted the risks in the recommended
5 investment products and services." (Dkt. 91, ¶ 132). It also contends that the Millrock
6 Defendants' conduct was reckless. *See* Dkt. 91, ¶134 (Defendants "should have known
7 that their malfeasance was harmful to elderly California residents...") Since the
8 allegations against the Millrock Defendants are not solely claimed to be fraudulent or
9 intentionally false, only Rule 8(a) applies. Clearly, claims 3 and 4 comply with the
10 minimal notice pleading requirements, which does not require detailed factual
11 allegations.

12 **2. Claims 5 and 6 for Breach of Fiduciary Duty and Aiding and Abetting**
13 **Breach of Fiduciary Duty Comply with Pleading Requirements**

14 Similarly, the Millrock Defendants claim that the breach of fiduciary duty claim is
15 grounded in fraud. However, the law is clear that breach of fiduciary duty may be based
16 on negligent conduct such that fraud is not a necessary element. *See Tribeca Companies,*
17 *LLC v. First Am. Title Ins. Co.*, 239 Cal.App.4th 1088, 1114 (2015) ("The breach of
18 fiduciary duty can be based upon either negligence or fraud, depending on the
19 circumstances.")

20 The First Amended Complaint clearly contends that, as an alternative to fraud,
21 Smith (and other Defendants) breached their fiduciary duty to Plaintiffs and Millrock
22 aided and abetted the breach of fiduciary duty owed to Plaintiffs. In particular, the First
23 Amended Complaint alleges that Smith

- 24 • "acted in capacity of licensed real estate brokers or agents or otherwise
25 performed duties on behalf of Plaintiffs consistent with acting in that
26 capacity..." (Dkt. 91, ¶ 155(a))
- 27 • "acted in the capacity of licensed securities agents or performed duties on
28 behalf of the Plaintiffs consistent with acting in that capacity and for which a

securities license is required and for which the law imposes fiduciary duties.”
Id., ¶155(b).

- “acted as agents of the Plaintiffs in matters concerning the investment in TIC Properties.” *Id.*, ¶155(c).

Each of these relationships imposes a fiduciary duty on Defendant Smith. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 194, 201 (1963) (United States Supreme Court recognizes investment advisers as fiduciaries); *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114, 1122 (9th Cir. 1994) (“An investment advisor is always a fiduciary.”); *S.E.C v. Criterion Wealth Management Services, Inc.*, 599 F.Supp.3d 932, 951 (C.D. Cal. 2022); *Lazar v. Bishop*, 107 Cal. App. 5th 668, 680 (2024), *reh'g denied* (Jan. 8, 2025) (“It is well established that a real estate broker owes a fiduciary duty to her client, which ‘requires the highest duty of good faith and undivided service and loyalty.’”)

The First Amended Complaint also alleges that Smith “breached the duty to disclose material information regarding the investments, including the risks, the creditworthiness and lack of operating history of the tenants, the failure to conduct adequate due diligence on the tenants, conflicts of interests, fees charged reducing the funds actually invested” and “by failing to disclose notable and significant facts that would alter any reasonable persons evaluation of the TIC investments.” The Millrock Defendants argument that there is no fiduciary relationship because the transaction was “arms length”(Dkt. 98, p 17) is nothing more than a competing factual contention which the Court may not consider at this stage in the proceedings.

Mann v. GTCR Golder Rauner, LLC, 483 F.Supp.2d 864, 878 (D. Ariz. 2007) cited by the Millrock Defendants is inapposite. In *Mann*, the Court dismissed the aiding and abetting breach of fiduciary duty claim because the underlying breach of fiduciary duty claim as to all defendants had previously been dismissed. Here, Smith and Millrock have not and cannot assert that the breach of fiduciary duty cannot survive against any defendant, thus there is no basis for the argument that aiding and abetting breach of

1 fiduciary duty cannot survive as a matter of law.

2 **3. Claims 7 and 8 for Constructive Fraud are Well Pled**

3 As discussed above, Plaintiffs properly pled their fraud claims and identified the
4 circumstances of the fraud such that the Millrock Defendants can fully respond to the
5 First Amended Complaint. In doing so, Plaintiffs complied with Rule 9(b). Thus, the
6 Motion to Dismiss must be denied as to claims 7 and 8 for constructive fraud.

7 **4. Claims 9 and 10 for Professional Negligence and Negligent**
8 **Misrepresentation is Well Pled**

9 Neither claims for professional negligence nor negligent misrepresentation are
10 grounded in fraud. These claims are not based on intentional conduct but rather negligent
11 conduct or representations the Millrock Defendants “may have honestly believed were
12 true.” (Dkt. 91, par. 198, 203). *See also Petersen*, 281 F.R.D. at 416-418 (“Rule 9(b)
13 does not apply to negligent misrepresentation claims . . . applying heightened pleading
14 standard to negligence is contrary to the express language and policy of Rule(9) . . .”);
15 *Bautista v. Valero Mktg. & Supply Co.*, No. 15-CV-05557-RS, 2016 WL 3924117, at *3
16 (N.D. Cal. July 21, 2016) (averments that Defendant omitted material information from
17 advertisements do not sound in fraud). These claims are not subject to heightened
18 pleadings standards. The allegations are sufficient as a matter of law to state claims
19 against the Millrock Defendants for professional negligence and negligent
20 misrepresentation.

21 **5. Claim 11 for Unfair Competition is Proper**

22 The Millrock Defendants also argue that the claim for unfair competition is
23 improper. As set forth above, Plaintiffs allege a number of facts setting forth unfair and
24 unlawful practices by the Millrock Defendants. In addition to numerous
25 misrepresentations and omissions in the Offering Memorandum discussed above, they
26 syndicated and sold securities to retail investors in violation of the law without proper
27 licensing, failed to conduct any investigation into the Property, received profits and used
28 investor funds without proper disclosure, provided insufficient information for the

1 Plaintiffs to evaluate the risks of the investment and engaged in deceptive practices to sell
2 securities without proper oversight and investigation. (*See e.g.* Dkt. 91, ¶ 211).

3 Accordingly, the claim for unfair competition is proper.

4 **6. Claim 12 for Control Person Liability is Proper**

5 “Section 20(a) of the Securities Exchange Act, 15 U.S.C. 78t, provides that '[e]very
6 person who, directly or indirectly, controls any person liable under any provision of this
7 chapter or of any rule or regulation thereunder shall also be liable jointly and severally
8 with and to the same extent as such controlled person ... unless the controlling person
9 acted in good faith and did not directly or indirectly induce the acts constituting the
10 violation or cause of action.' *See also* 17 C.F.R. 230.405 (defining “control”). To state a
11 control-person claim, plaintiff must establish (1) a primary violation of the federal
12 securities laws, and (2) that defendants exercised actual power or control over the
13 primary violator.” *In re LDK Solar Sec. Litig.*, No. C0705182WHA, 2008 WL 4369987,
14 at *12 (N.D. Cal. Sept. 24, 2008).

15 “[S]ection 20(a) control person claims are subject to the more general notice
16 pleading requirements of Fed. R. Civ. P. 8(a)(2)” not 9(b) or PSLRA. *Teamsters Loc. 617*
17 *Pension & Welfare Funds v. Apollo Grp., Inc.*, 690 F. Supp. 2d 959, 970 (D. Ariz. 2010);
18 *see also In re Countrywide Fin. Corp. Sec. Litig.*, 588 F.Supp.2d 1132, 1201 (C.D. Cal.
19 2008) (“Although the circumstances of the primary violators' fraud must be pled with
20 particularity under Rule 9(b) [and the PSLRA], the control element is not a circumstance
21 that constitutes fraud and therefore need not be pled with particularity.”); *In re LDK*
22 *Solar Sec. Litig.*, *supra*, at *12.

23 The Millrock Defendants have not demonstrated that there is no primary violation
24 of Rule 10b5 by Defendant Millcreek Commercial Properties, LLC such that control
25 liability cannot survive against Millrock. All elements of control person liability are
26 properly pled and, as such, cannot be dismissed as a matter of law.

27 **E. If the Court grants the Motion, Leave to Amend Should be Granted**

28 “The purpose of pleading under the Rules ‘is to facilitate a proper decision on the

1 merits.’ *Conley v. Gibson*, 355 U.S. 41, 48 (1957). To this end, Rule 15 ‘was designed to
2 facilitate the amendment of pleadings except where prejudice to the opposing party
3 would result.’ *United States v. Hougham*, 364 U.S. 310, 316 (1960). ‘If the underlying
4 facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he
5 ought to be afforded an opportunity to test his claim on the merits. In the absence of any
6 apparent or declared reason— such as undue delay, bad faith or dilatory motive on the
7 part of the movant, repeated failure to cure deficiencies by amendments previously
8 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,
9 futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely
10 given.’ *Foman v. Davis*, 371 U.S. 178, 182 (1962).” *Breier v. N. Cal. Bowling*
11 *Proprietors' Ass'n*, 316 F.2d 787, 789–90 (9th Cir. 1963) (internal citations included).

12 “[L]eave shall be freely given when justice so requires.’ This policy is ‘to be
13 applied with extreme liberality.’ *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d
14 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d
15 1074, 1079 (9th Cir. 1990)).” *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051
16 (9th Cir. 2003) (finding that failure to grant leave to file Second Amended Complaint was
17 abuse of discretion). Absent prejudice, or a strong showing of any of the remaining
18 Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to
19 amend. *See Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997). A
20 simple denial of leave to amend without any explanation by the district court is subject to
21 reversal. Such a judgment is ‘not an exercise of discretion; it is merely abuse of that
22 discretion and inconsistent with the spirit of the Federal Rules.’ *Foman, supra*, 371 U.S.
23 at 182, 83 S.Ct. 227; *Klamath–Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701
24 F.2d 1276, 1292–93 (9th Cir. 1983) (noting “where the record does not clearly dictate the
25 district court's denial, we have been unwilling to affirm absent written findings”); *Rolf v.*
26 *City of San Antonio*, 77 F.3d 823, 828–29 (5th Cir.1996); *United Steelworkers of Am.,*
27 *AFL–CIO v. Mesker Bros. Indus., Inc.*, 457 F.2d 91, 94 (8th Cir. 1972).” *Id.* (internal
28 citations included) (emphasis added).

1 “The purpose of pleadings is ‘to facilitate a proper decision on the merits,’ and not
2 to erect formal and burdensome impediments in the litigation process.” *Howey v. U.S.*,
3 481 F.2d 1187, 1190 (9th Cir. 1973). Liberality in granting leave to amend is “especially
4 important in the context of PSLRA” where “drafting a cognizable complaint can be a
5 matter of trial and error.” *Id.* at 1052.

6 **IV. CONCLUSION**

7 Based on the foregoing, Plaintiffs respectfully request that the Court deny
8 Defendants Brent Smith and Millrock Investment Fund 1, LLC’s Motion to Dismiss First
9 Amended Complaint. Should the Court grant the Motion, Plaintiffs respectfully request
10 that the Court do so without prejudice and grant leave for Plaintiffs to file an amended
11 complaint.

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13 Dated: June 27, 2025

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